HOWARD RESEARCH & DEVELOPEMT CORPORATION	*	IN THE
	*	
	*	MARYLAND TAX COURT
v.	*	
	*	
HOWARD COUNTY, MARYLAND DEPARTMENT OF FINANCE, ET. AL.	*	No. 20-MI-OO-0065
	*	

MEMORANDUM AND ORDER

In this appeal the Petitioner, Howard Research and Development Corporation ("Corporation") objects to the imposition of a building excise tax (BET) by the Howard County Department of Finance and Department of Inspections, Licenses and Permits ("Departments"). The tax was levied on two parking garages constructed by the Corporation in Columbia, Maryland.

The Corporation appealed the BET imposition to the Director of Finance for Howard County. After a hearing the imposition of the BET was affirmed. This appeal is taken from that decision.

The two parking garages are described as the Tenable Garage and the Retail Garage. For purposes of the BET levy the parking garages were categorized by the Departments as being for "distribution and manufacturing". Howard County Code ("Code") §§ 20-503(a)(4).

The Tenable Garage contains an enclosed emergency services facility served by mechanical ventilation, which is approximately 7,854 square feet. There are also ancillary facilities, e.g., electrical room and elevator shaft, which encompass 3,529 square feet. The remaining square footage of the 531,432 square foot Tenable Garage is essentially for parking vehicles and is ventilated passively through designed access to the natural flow of outside air.

The first floor of the Retail Garage, which encompasses 13,615 square feet, is served by mechanical ventilation. There is also an elevator chase encompassing 987 square feet. The remaining square footage of the 209,418 square foot Retail Garage is for parking vehicles and is essentially ventilated passively through designed access to the natural flow of outside air.

The issuance of building permits for the Garages was conditioned on payment of the BET, as computed by the Departments. The computed BET for the Retail Garage and Tenable Garage was $125,650.80 and $382,631.04, respectively.[1] The Corporation paid these taxes under protest in 2018. The BET was levied on the entire square footage of the Garages. While suggesting it may be entitled to more, the Corporation only seeks partial refunds for the "...open air ventilation portions of the subject garages." Petitioner's Pretrial Bench Brief at 9 & 13.

The BET was levied pursuant to Code §§ 20.500 et. seq. These provisions were first enacted in 1992, pursuant to State enabling legislation. Chapter 285, Laws of 1992.[2]

The Court's analysis will initially focus on statutory construction of Code §§ 20.500 et. seq., which the Corporation argues does not justify the BET's application to garages. In undertaking this analysis, the Court is mindful that

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[1] The BET amount is determined by the Director of Inspections, Licenses and Permits. Code § 20.504(a).

[2] The original 1992 authorization sunset in 2 years. *Id.* at Section 2. In 1994 the sunset was extended to six years. Chapter 224, Laws of 1994, Section 2. The sunset was subsequently stricken. Chapter 493, Laws of 1996, Section 2.

doubt in interpreting a tax statute should be resolved in favor of the taxpayer. *Scoville Service., Inc. v. Comptroller*, 269 Md. 390, 396 (1973), *Montgomery County. v. Fulks*, 65 Md. App. 227, 233 (1985). The analysis leads this Court to conclude parking garages are not subject to the BET.

The relevant Code provisions provide the following definitions for BET application:

> *Building* means a structure with exterior walls which combine to form an occupiable structure. Code δ 20.502(c)
>
> *Occupiable* means designed for human occupancy in which individuals may live, work, or congregate for amusement, educational or similar purposes and which is equipped with means of egress, light and ventilation facilities. *Id.* at δ 20.502(i)

Longstanding statutory construction. principles direct that the initial focus for the analysis be the plain meaning of the words in the statute. *Donlon v. Montgomery County Schools*, 460 Md. 62, 76 (2018).[3] In this regard and to ascertain the "natural and ordinary" meaning of statutory terms, dictionary definitions provide guidance. *75-80 Props., L.L.C. v. Rale, Inc.*, 470 Md. 598, 632 (2020); *Sabisch v. Moyer*, 466 Md. 327, 366 (2019). Dictionaries often referenced are Black's Law Dictionary and the on-line Merriam-Webster Dictionary. *Id.* at 366; *Ford v. State*, 462 Md. 3, 33 (2018); *Lane v. Supervisor*,

[3] As this Court finds no ambiguity in the subject Code provisions, this Court will "...apply the statute as written, without resort to other rules of construction...," as the Departments urge. *Donlon v. Montgomery County Schools, supra.* at 76; See also *Robey v. State*, 397 Md. 449, 453 (2007): *State v. Glass*, 386 Md. 401, 409 (2005)

447 Md. 454, 475 (2016), *Rowhouses, Inc. v. Smith*, 446 Md. 611, 657 (2016), *Bottini v. Department*, 450 Md. 177 , 198 (2016).

The operative word determining imposition of the BET is "occupiable," as a building must be "occupiable" for the BET to apply. Relevant dictionary definitions of "occupiable" are as follows.

> The act, state, or condition of holding, possessing, or residing in or on something; actual possession, residence, or tenancy, [especially] of a dwelling or land." Black's Law Dictionary (10 ed. 2014).
>
> The fact or condition of holding, possessing, or residing in or on something. Merriam Webster Dictionary https://www.merriamwebster.com/dictionary/occupancy

For the BET to apply, the building must "...be designed for human occupancy." The above definitions establish that "occupancy" envisions some level of permanence. A parking garage does not offer a level of permanence. It is a transitory facility from where persons travel often for occupancy at other locations.[4] This interpretation is borne out as the statutory definition not only provides that the building must "...be designed for human occupancy..." but adds that the building must also be one "...in which individuals may live, work, or congregate for amusement, educational or similar purposes." Code § 20.502 (a)(i). A parking garage does not serve such proposes.

The Department's categorization of the Garages further supports the above analysis. The County is required to establish a schedule of rates for the BET.

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[4] This Court rejects the Departments' assertion that incidental activities supporting garage usage, e.g., janitorial and security services, establishes the requisite occupancy. Even if germane, there is no evidence the Garages include specific accommodations for these persons to "occupy" the Garages.

Code § 20.503(a). In implementing this directive, the County established five rate categories. *Id.* at 20.503(a) (1)-(5). In applying the BET to the Garages, the Departments categorized them as for "distribution and manufacturing additional and new construction." *Id* at 20.503(a) (4). This categorization presumptively was determined by the Departments as the most appropriate of the five categories.

"Distribution and manufacturing additional and new construction" is defined as referring "...to the use of a building for warehousing, distribution, packaging, processing, manufacturing, storage of construction equipment or supplies, and similar uses." Code § 20.502 (a)(f). This definition clearly does not apply to parking garages.

The Departments argue the definition applies as a parking garage is a facility for warehousing vehicles. This suggestion is rejected as inconsistent with the transient nature of parking garage usage, as noted above. It is further contrary to the intentions of persons who park their vehicles in parking garages, as they typically intend to retrieve those vehicles within a limited time frame.

The Code does reference "garages" in the context of parking facilities. See Code §§ 12.601(n)(vii) & (xxiv), 14.104 III.(g), 133.0 (c)(1). These references further evidence a legislative intent for "garages" to not be subject to the BET, as "garages" are not specifically referenced at Code §§ 20.500 et. seq, as they are in Code provisions elsewhere. See *Griffin v. Lindsey*, 444 Md. 278, 287-289 (2015); *Lyon v. Campbell*, 324 Md. 178, 185-186 & 189 (1991); *Rosecroft Trotting & Pacing Association, Inc. v. Prince George's County*, 298 Md. 580, 594(1984); *Fox v. Comptroller*, 126 Md. App 279, 287-288 (1999).

This Court further concludes, as the Corporation asserts, that the areas of the Garages ventilated passively through designed access to the natural flow of outside air could not be subject to the BET. In reaching this conclusion this Court again relies on accepted principles of statutory construction.

The relevant provision is the concluding phrase for the definition of "Occupiable," requiring for the BET to apply that the building must be "...equipped with means of egress, light, and ventilation facilities." Code § 20.502 (a)(i). It thus must be determined whether "ventilation facilities," envision more than passive ventilation, i.e., mechanical ventilation.[5] Again, reference to dictionary definitions is appropriate. In this regard, the singular "facility" is defined, in relevant part, as "[s]omething (such as a hospital) that is built, installed, or established to serve a particular purpose." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/facility at 4(b). So, modifying "ventilation" with "facilities" requires the ventilation be provided through an active mechanism, that is "built, installed, or established."[6] To interpret the provision otherwise would render the term "facilities" nugatory,

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[5] The Departments argue that the plural "facilities" cannot envision mechanical ventilation as "...most structures are not equipped with two mechanical ventilation systems." Respondent's Bench Brief Responding to Petitioner's Pretrial Bench Brief at 9. This argument ignores statutory direction that "[t]he singular includes the plural and the plural includes the singular." General Provisions Article § 1-202

[6] "Facilities'" application is limited to ventilation as "...a qualifying clause ordinarily is confined to the immediately preceding words or phrase—particularly in the absence of a comma before the qualifying clause...". Sullivan v. Dixon, 280 Md. 444, 451 (1977)

which is not consistent with principles of statutory construction. *State v. Glass*, *supra.* at 410 (2005); *James v. Butler*, 378 Md. 683, 696 (2003).

While the Departments now argue the BET applies to the passively ventilated portions of the Garages, from the BET's enactment in 1992 until 2016, the BET was only levied on portions of garages served by mechanical ventilation. This "...consistent and long-standing construction given a statute by the agency charged with administering it is entitled to great deference." *Marriott Employees Federal Credit Union v. Motor Vehicle Administration*, 346 Md. 437, 445 (1997). In regard to the Departments' effort to reject this "...consistent and long-standing construction," the Court of Appeals has noted parenthetically that an "agency cannot casually ignore prior policies and standards." *Office of People's Counsel v. PSC*, 461 Md. 380, 401 (2018), citing *Frederick Classical Charter School, Inc. v. Board,* 454 Md. 330, 406-7 (2017).[7] The scrutiny of the statute cited by the Departments as underlying rejection of their prior practice does not surmount this admonition or justify rejecting their "...consistent and long-standing" practice of not applying the BET to passively ventilated portions of garages.

The Departments' argue there is not sufficient history of the BET not being applied to passively ventilated portions of parking garages to establish the

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[7] "[W]hen an agency changes a position clearly established in its own prior precedent it "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Anastasi* , 77 Md.App. at 137, 549 A.2d 753 (quoting Local 32, *Am. Fed'n of Gov't Employees, AFL–CIO v. Fed. Labor Relations Auth.* , 774 F.2d 498, 502 (D.C. Cir. 1985)." *Frederick Classical Charter School, Inc. v. Board, supra.* at 407. The Departments failed to provide this requisite analysis. In this regard, an opinion of the County Attorney would likely suffice.

requisite "...consistent and longstanding practice." This argument is rejected. The parties stipulated to fourteen instances between 2004 and 2016 of the passively ventilated portions of parking garages not being taxed. The exhibit listing these instances reflects the BET revenues collected were significant, totaling $4,068,607.19. Stipulation of Undisputed Facts at 14, 15, & Exhibit 11. And deposition testimony from an official, designated as representing the County, acknowledged a consistent interpretation before 2016 of passively ventilated portions of garages not being subject to the BET. Trial Transcript at p. 67, l. 2-8.

The parties' citation to the building code to support their positions is misplaced. For its building code, the County has adopted by reference the International Building Code, 2018 Edition ("IBC"). Code § 3.100 (b)(1). The IBC states its purpose is "...to establish the minimum requirements to provide a reasonable level of safety, public health and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire, explosion and other hazards, and to provide a reasonable level of safety to firefighters and emergency responders during emergency operations." IBC § [A] 101.3. This purpose has no relation to taxation and is certainly not in *pari materia* with the BET Code provisions.[8] See *Donlon v. Montgomery County Public Schools, supra.* at 98. Further, in a single instance the BET provisions reference the building code, in part, for the definition of a "building." Code § 20.502 (c). The failure to otherwise reference building code provisions indicates

[8] The cited mechanical code has a similar statement of purpose. International Mechanical Code, 2018 Edition, § [A] 1-1.2.1.

the other provisions cited by the parties are not germane. See *Griffin v. Lindsey*, *supra.* at 287-289; *Lyon v. Campbell*, *supra.* at 185-186 & 189; *Rosecroft Trotting & Pacing Association, Inc. v. Prince George's County*, *supra* at 594; Fox *v. Comptroller*, *supra. at 287-288.*

The Corporation raises issue with the Departments' failure to submit the change in position regarding BET taxation of passively ventilated parking garages to rule-making procedures required by the County's Administrative Procedures Act ("APA"). Code § 2.100 et. seq. Relying primarily on *Frederick Classical Charter School, Inc. v. Board, supra.*, the Corporation asserts this failure renders the position change invalid. As the Corporation misconstrues the case and the relevant APA provision, this argument is rejected.

The APA defines, in relevant part, a "rule" to which the Act applies as "[a] statement or amendment of a statement, of general applicability and future effect that is authorized by law to be adopted by an Agency to implement a law that the Agency administers..." Code § 2.101(i). There was no rule making or adjudicative proceeding by the Departments initially establishing the practice to not apply the BET to passively ventilated parking garages, as there was "...no statement authorized by law to be adopted by [the Departments] to implement [the BET]..." In changing their position, the Departments did not rely on a law, as required for a "rule" to arise, as the definition of "rule" envisions specific statutory authorization for the agency to promulgate regulations or guidance, which is lacking in this instance. In addition, there was no "statement" by the Departments when initially implementing the practice by which passively

ventilated portions of garages were not subjected to the BET. Hence, when the practice was changed, adherence to the APA was not required. See also *Baltimore City Board of School Commissioners v. City Neighbors Charter School*, 400 Md 324, 345 (2007). Consistent with this conclusion, the Court in *Frederick Classical Charter School* noted rulemaking was not required when "...although the agency action represented a change in its prior enforcement pattern, "there was no change in existing law or regulation[,]" and the agency action "was not retrospective, instead deciding the facts before it and imposing requirements for prospective activities[.]". *Id.* at 408.[9]

This Court rejects the Company's contention that the BET rates the Departments imposed on the Garages' passively ventilated areas violated the rate increase limits in the BET law. Those limits are, in relevant part, that "...the percentage of the increase in the building excise tax since the month and year when the building excise tax is first enacted may not exceed the percentage of the increase of the ENR construction cost index for the Baltimore Region.... since the base month and year when the building excise tax was first enacted." Code § 20.500 (c)

The Company essentially argues the Department's imposition of the tax on the passively ventilated portions of the garages constitutes a new tax with the base year for rate increases being the year in which that tax is first levied. This

[9] The Company's reliance on *CBS v. Comptroller*, 310 Md. 687 (1990) is also misplaced, as the holding in that case "...is confined [] to situations where the agency adjudication changed substantially the application or effect of an existing law or regulation, not to an agency's interpretation of a stand-alone statute." *Frederick Classical Charter School, Inc. v. Board, supra.* at 408-409.

argument ignores the statutory provisions providing that the base is when the BET itself "...is first enacted."

Accordingly, it is this 27th day of December, 2021, by the Maryland Tax Court **ORDERED** that the decision of the Howard County Director of Finance is **REVERSED,** and the Company is entitled to the refund it has requested.[10]

CC: Kevin P. Kennedy, Esq.
David R. Moore, Esq.

CERTIFIED TRUE COPY
TEST: John T. Hearn, Clerk

NOTICE: You have the right of appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Petition for Judicial Review **MUST** be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries.

[10] Issues raised not specifically addressed by this Court were deemed *de minimus.* irrelevant, or without merit.